IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LINCOLN N. RILEY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13345 Trial Court No. 3PA-13-00791 CR MEMORANDUM OPINION No. 7050 — March 8, 2023

Appeal from the Superior Court, Third Judicial District, Palmer, Jonathan A. Woodman, Judge.

Appearances: David T. McGee, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

Lincoln N. Riley was convicted, following a jury trial, of second-degree sexual assault and attempted first-degree harassment.[1] Riley now appeals, raising three claims.

First, Riley argues that the trial court erred in declining to give his proposed jury instruction on the definition of "without consent," which stated that the coercive force used to achieve the sexual contact had to be over and above the force inherent in the act of contact itself. Riley contends that the court's failure to give his requested instruction constitutes structural error. Second, Riley argues that there was insufficient evidence to support his second-degree sexual assault conviction. Lastly, Riley argues that his 10-year sentence is excessive. For the reasons explained in this opinion, we reject Riley's claims and affirm his convictions and sentence.

Background facts and proceedings

In April 2012, S.H. was an eighteen-year-old high school senior. She was no longer living with her parents and alternated staying with different friends and family members. At one point, Cynthia Riley offered to allow S.H. to stay with her and her husband, Lincoln Riley. S.H. accepted, and subsequently slept on the couch in the ground-floor living room of the Rileys' cabin while the Rileys slept in the loft upstairs.

S.H. testified at trial that, in the early morning hours of April 22, 2012, she was asleep on the couch and awoke to find Riley, who smelled strongly of alcohol, sitting next to her with his hand on her leg underneath her pajamas, moving towards her thigh. S.H. pushed his hand away, but he again put his hand on her leg and she pushed his hand away for a second time. S.H. described an active struggle where Riley tried to

[1] AS 11.41.420(a)(1) and AS 11.61.118(a)(2) & AS 11.31.100(a), respectively.

remove her clothing while she resisted. S.H. pushed his hands away for a third time, and Riley then touched her breasts over her clothing.

As S.H. tried to sit up on the couch, Riley leaned over her and used his body weight to hold her down. After several attempts, S.H. was able to push Riley away and get up from the couch. S.H. testified that, as she tried to move away from the couch, Riley grabbed her wrist and shirt and tugged at the waistband of her pajama pants, telling her that he "wanted to see how [she] taste[d]." S.H. eventually freed herself and went upstairs to sleep with Cynthia Riley.

S.H. told her boyfriend's mother about the incident shortly after it occured, and she took S.H. to a police station. Riley was charged with one count of second-degree sexual assault for touching S.H.'s breasts over her clothing, and one count of attempted first-degree sexual assault based on Riley's statement that he wanted to see how S.H. tasted, which the State interpreted as an attempt to engage in cunnilingus.[2]

Riley's case was tried in March 2018 and S.H. testified as set out above.[3] In order to prove the charge of second-degree sexual assault, the State had to establish beyond a reasonable doubt that the sexual contact occurred "without consent," as that term is defined under Alaska law. At the time of Riley's offense, "without consent" was defined as meaning "that a person . . . with or without resisting, is coerced by the use of

---

[2] AS 11.41.420(a)(1) and former AS 11.41.410(a)(1) (2012) & AS 11.31.100(a), respectively.

[3] Riley initially entered into an Alaska Criminal Rule 11 plea agreement with the State that resolved this case and a second unrelated case. Under the agreement, the charges in this case were dismissed in exchange for a guilty plea to a single count of second-degree sexual abuse of a minor in the other case. But Riley later filed a post-conviction relief action, and he was permitted to withdraw his plea, resulting in reinstatement of the charges in this case.

force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone."[4]

At trial, Riley's counsel proposed a jury instruction defining "without consent" that was consistent with this Court's decision in *State v. Townsend*.[5] The proposed instruction read, in relevant part, as follows:

> To prove the element of "without consent" as set forth in the offense of sexual assault in the second degree, the State is required to prove more than that the defendant forcibly touched the victim. The force used must be something other than the bodily impact or restraint inherent in the charged act of sexual contact.
>
> It is not enough that the state show that a person does not subjectively consent to sexual contact. Rather, the state must show that the person does not subjectively consent and the person is coerced by the use of force or by the express or implied threat of death, imminent physical injury, or kidnapping.

The State objected to Riley's proposed instruction on the basis that *Townsend* was an unpublished decision and that the language Riley proposed was not necessary to accurately convey the concept of "without consent." The State proposed that the trial court give the pattern jury instruction defining "without consent," which tracked the statutory language. The trial court agreed with the State, and instructed the jury according to the statutory definition of "without consent."[6]

---

[4] Former AS 11.41.470(8)(A) (2012). The definition of "without consent" has since been amended by the legislature, effective January 1, 2023. SLA 2022, ch. 44, §§ 6, 26.

[5] *State v. Townsend*, 2011 WL 4107008, at *4 (Alaska App. Sept. 14, 2011) (unpublished).

[6] The pattern instruction that was provided to the jury defined "without consent," in (continued...)

At trial, Riley argued that S.H.'s testimony was not credible, that she had made inconsistent statements at different times, and that he was not guilty of the charged offenses. Riley suggested that S.H. might have fabricated her claims so that her boyfriend's mother would allow S.H. to live with her in her larger and more comfortable house which had running water, as opposed to the Rileys' dry cabin.

The jury convicted Riley of second-degree sexual assault for touching S.H.'s breasts over clothing. The jury acquitted Riley of attempted first-degree sexual assault, but found him guilty of the lesser-included offense of attempted first-degree harassment. The trial court sentenced Riley to a 10-year term of imprisonment for the second-degree sexual assault conviction and a 7-day sentence for the attempted harassment conviction, with 1 day running consecutively to the sexual assault sentence — resulting in a composite sentence of 10 years and 1 day to serve.

This appeal followed.

Why we conclude that the trial court's refusal to give Riley's proposed jury instruction does not amount to reversible error

Riley was charged with violating the provision of the second-degree sexual assault statute which prohibits "engag[ing] in sexual contact with another person without consent of that person."[7] "Sexual contact" is defined in relevant part as "knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast."[8]

---

[6] (...continued)
relevant part, as meaning "that a person, with or without resisting, is coerced by the use of force against a person or property, or by express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone."

[7] AS 11.41.420(a)(1).

[8] AS 11.81.900(b)(61)(A)(I).

And as we previously explained, "without consent" was defined at the time of Riley's offense as meaning "that a person . . . with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone."[9]

With respect to Riley's proposed instruction on the meaning of "without consent," at the time of his trial in March 2018, there were two unpublished decisions from this Court which supported his request. The first case was *Inga v. State*.[10] In *Inga*, we assumed that the defendant was entitled to his proposed jury instruction that "the force employed by the defendant had to be 'more than [simply] the bodily impact involved in achieving sexual penetration or sexual contact'; rather, the State had to show that the defendant used 'some force or threat of force beyond that involved in the act itself.'"[11] The second case was *State v. Townsend*.[12] The majority opinion in *Townsend* recognized an additional aspect of the meaning of "without consent," *i.e.*, that it requires that the defendant's use (or threat of use) of force must cause the victim's submission to or subjection to the sexual act.[13] Judge Mannheimer agreed with the majority in his concurrence, reiterating the point from *Inga* that the "force [used] must be something

---

[9] Former AS 11.41.470(8)(A) (2012).

[10] *Inga v. State*, 2004 WL 719626 (Alaska App. Mar. 31, 2004) (unpublished).

[11] *Id.* at *4. We further held, however, that the court's failure to give Inga's proposed instruction was harmless because any latent ambiguity in the pattern instruction was cured by the parties' arguments. *Id.* at *5-6.

[12] *State v. Townsend*, 2011 WL 4107008 (Alaska App. Sept. 14, 2011) (unpublished).

[13] *Id.* at *4.

other than the bodily impact or restraint inherent in the charged act of sexual penetration or sexual contact."[14]

After the conclusion of Riley's trial, we adopted these interpretations of "without consent" in a published decision, *Inga v. State* (involving a different defendant than our unpublished 2014 case of the same name), and have reaffirmed these points of law in several subsequent decisions.[15] Based on this case law, we agree with Riley's contention that his proposed instruction represented a correct statement of the law.

Riley argues that his proposed instruction set out an element of the offense which was missing from the pattern instruction: the requirement that the force used be greater than that inherent in the sexual contact. In *Jordan v. State*, the Alaska Supreme Court held that the failure to instruct the jury on a contested element of the offense is structural error (an error requiring automatic reversal regardless of prejudice).[16] Riley thus contends that the failure to give his proposed instruction was structural error.

We disagree with Riley's contention that the failure to give his proposed instruction amounted to structural error. As an initial matter, we note that an explanation of the force necessary to satisfy the definition of "without consent" has not traditionally been expressly included as an element of second-degree sexual assault in our case law. For example, in *State v. Mayfield*, issued two months after our 2019 decision in *Inga* was published, we described second-degree sexual assault as requiring the State to prove three elements: (1) the defendant engaged in "sexual contact" with another person; (2) the sexual contact was "without consent"; and (3) the defendant acted in reckless

---

[14] *Id.* at *8 (Mannheimer, J., concurring).

[15] *See Inga v. State*, 440 P.3d 345, 349 (Alaska App. 2019); *Dorsey v. State*, 480 P.3d 1211, 1214-15 (Alaska App. 2021); *Galindo v. State*, 481 P.3d 686, 688 n.2 (Alaska App. 2021).

[16] *Jordan v. State*, 420 P.3d 1143, 1155-56 (Alaska 2018).

disregard of the circumstance that the sexual contact was "without consent."[17] Under this framing, the jury instructions here — which informed the jury that the sexual contact had to be "without consent," and provided the statutory definition of "without consent" (*i.e.*, coercion by the use of force) — did not completely omit an element of the offense. Therefore, this was not structural error under *Jordan*.

We acknowledge, however, that focusing only on the elements of a crime as traditionally defined would privilege form over substance. The Alaska Supreme Court's central concern in *Jordan* was whether the jury was instructed as to every critical fact the State was required to prove beyond a reasonable doubt.[18] It therefore stands to reason — although we need not definitively resolve the issue in this case — that the complete failure to instruct the jury as to a critical fact should constitute structural error under *Jordan* even if, as is the case here, that fact has not previously been defined as an essential element of the offense.

Even under this more expansive interpretation of *Jordan*, however, we conclude that the failure to provide Riley's requested instruction in this case was not structural error because the instructions that were given implicitly informed the jury that it was required to find that Riley used force beyond that inherent in the act of sexual contact.

As we noted, the jury was instructed on the statutory definition of "without consent" — *i.e.*, in relevant part, "that a person . . . with or without resisting, is coerced by the use of force against a person or property[.]" This instruction made clear that the State was required to prove that (1) Riley used "force" and (2) S.H. was "coerced" by

---

[17] *State v. Mayfield*, 442 P.3d 794, 798 (Alaska App. 2019).

[18] *Jordan*, 420 P.3d at 1154-57 (citing *Neder v. United States*, 527 U.S. 1, 30-40 (1999) (Scalia, J., concurring in part and dissenting in part)).

this use of force. The jury at Riley's trial was also instructed as to the statutory meaning of "force," *i.e.*, "any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement, . . . [including] deadly and nondeadly force."[19]

In his concurring opinion in *Townsend*, Judge Mannheimer expressed concern that this statutory definition of "force" could potentially be interpreted so broadly that any act of sexual contact would include an element of bodily impact or restraint.[20] But this reading is not an obvious one. Few people, speaking colloquially, would be likely to describe the mere act of touching another person's breast or genitalia as a use of "force," or a "bodily impact," or a "restraint." Rather, the much more natural interpretation of the statutory language defining "force" is the one we adopted in *Inga* — that "force" requires a level of bodily impact or restraint that goes beyond the mere act of sexual contact.[21]

In Riley's case, particularly given that he never argued at trial that there was insufficient evidence of "force," the natural reading of the jury's instructions was that any bodily impact needed to be beyond that inherent in the act of sexual contact itself.

Moreover, even if the jury had adopted the broad definition of the phrase "any bodily impact [or] restraint," it could still only convict Riley if it concluded that this bodily impact or restraint had a coercive effect. As Judge Mannheimer noted in his concurrence, the statutory definition of "without consent" does not refer to acts of sexual penetration or contact that are achieved by force; rather, it speaks of *coercion* that is

---

[19] AS 11.81.900(b)(28). At the time of Riley's offense, this provision was codified in paragraph (b)(27).

[20] *See State v. Townsend*, 2011 WL 4107008, at *7 (Alaska App. Sept. 14, 2011) (unpublished) (Mannheimer, J., concurring).

[21] *See Inga v. State*, 440 P.3d 345, 349 (Alaska App. 2019).

achieved by force.[22] This requirement strongly implies something more than the bodily impact or restraint inherent in the charged act of sexual contact.

Because the statutory language provided to the jury in this case implicitly informed the jury that the force must be something beyond that inherent in the sexual contact, the instructions did not fail to apprise the jury of every critical fact necessary to return a guilty verdict. We therefore conclude that the failure to provide Riley's requested instruction was not a structural error requiring automatic reversal, even under the more expansive interpretation of *Jordan* we have articulated above.[23]

Riley argues that even if the failure to give his proposed instruction was not structural error, the failure was nonetheless prejudicial error requiring reversal of his conviction. We acknowledge that Riley's proposed instruction was a fuller and more accurate statement of the law governing Riley's case, and as a general matter, it is better to have the most cogent statement of the law defining the offense provided to the jury.

---

[22] *See Townsend*, 2011 WL 4107008, at *7 (Mannheimer, J., concurring); *see also* former AS 11.41.470(8)(A) (2012).

[23] *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 35 (1999) (Scalia, J., concurring in part and dissenting in part) ("The failure of the court to instruct the jury properly — whether by omitting an element of the offense or by so misdescribing it that it is effectively removed from the jury's consideration — *can* be harmless, if the elements of guilt that the jury *did* find necessarily embraced the one omitted or misdescribed."); *cf. Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in judgment, joined by Brennan, Marshall, and Blackmun, JJ.) ("When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed. The error is harmless because it is beyond a reasonable doubt, that the jury found the facts necessary to support the conviction." (internal citation and quotation omitted)).

However, we conclude that any error in failing to give Riley's proposed instruction did not appreciably affect the verdict and was therefore harmless.[24]

As we have already discussed, the instructions that were given implicitly conveyed that the force used had to be over and above that inherent in the act of sexual contact itself. And the prosecutor, in her closing argument, argued that Riley and S.H. had engaged in a lengthy struggle involving force, and she explained that the charge of sexual assault required conduct greater than the simple touching required for the offense of harassment.[25]

There was ample support in the record for this interpretation of events. S.H. testified that she had to push Riley's hands away multiple times, and that they engaged in an active struggle while Riley tried to remove her clothing and overcome her resistance. S.H. was ultimately able to push Riley away after he used his body weight to hold her down on the couch. Notably, Riley did not argue at trial that no force was used, but rather that S.H.'s allegations were not credible. Under these circumstances, we conclude that it is unlikely that the jury convicted Riley under the erroneous legal theory that the force used to commit sexual assault was the force inherent in his act of sexual contact with S.H.

Why we reject Riley's sufficiency-of-the-evidence claim

Riley claims that the evidence was insufficient to support his conviction for second-degree sexual assault. Specifically, he argues that there was insufficient evidence that any use of force on his part coerced S.H.'s acquiescence or submission to his act of

---

[24] *See Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969).

[25] *See* AS 11.61.118(a)(2) (with intent to harass or annoy, the defendant touches through clothing another person's genitals, buttocks, or female breast).

touching her breasts. In support of this argument, Riley points to S.H.'s statements to the police, which were played at trial. Riley interprets these statements as suggesting that S.H. awoke to Riley touching her breasts and that any use of force occurred *after* she awoke.

But Riley's claim fails because it depends on viewing the evidence in the light most favorable to himself, and we are required to view the evidence in the light most favorable to the jury's verdict.[26]

S.H.'s statements to the police were fairly brief, and her description of the events was developed in more detail at trial. At trial, S.H. testified that she awoke to find Riley's hand on her leg underneath her pajamas, moving towards her thigh. After S.H. pushed Riley's hand away, he put it on her leg a second time before she again pushed it away. S.H. then described an active struggle in which Riley tried to remove her clothing and succeeded in touching her breasts over her clothing.

Viewed in the light most favorable to the verdict, this testimony supports the interpretation that Riley only touched S.H.'s breast after coercing her through the use of force. We therefore reject Riley's claim that there was insufficient evidence to support his second-degree sexual assault conviction.

Why we reject Riley's claim that his 10-year sentence is excessive

Riley was previously convicted of felony assault in 1985.[27] However, because this offense was outside of the 10-year look-back window set out in AS 12.55.145(a)(1)(A), it did not qualify as a prior felony conviction for purposes of

---

[26] *See Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

[27] *See Riley v. State*, 1986 WL 1165506, at *1 (Alaska App. Feb. 26, 1986) (unpublished) (affirming conviction for third-degree assault, a class C felony).

presumptive sentencing.[28] Riley was thus considered a first felony offender and was subject to a presumptive range of 5 to 15 years for his second-degree sexual assault conviction.[29] He was subject to a sentence of up to 90 days for the attempted first-degree harassment conviction.[30]

At the sentencing hearing, the State argued that the court should impose a 12-year sentence, emphasizing that S.H. was vulnerable due to her youth and lack of a stable living situation. Riley's counsel argued that Riley had rehabilitative potential and requested that the court impose a sentence at or only slightly above the bottom end of the presumptive range for the second-degree sexual assault, *i.e.*, 5 years.

The trial court agreed with the State that S.H. was vulnerable, and stated that, given the nature of the offense, community condemnation and reaffirmation of societal norms were "foremost" sentencing goals. The court also explained that in light of Riley's significant criminal history, isolation was another important sentencing goal,

---

[28] *See also Williams v. State*, 418 P.3d 870, 872-74 (Alaska App. 2018) (for purposes of counting prior convictions for a person being sentenced under AS 12.55.125(I) for a sexual felony, the provisions of AS 12.55.145(a)(1) and (a)(4) are complementary, not mutually exclusive, and that the 10-year look-back period set out in AS 12.55.145(a)(1)(A) for counting class B and C felonies thus applies). The law, as interpreted in *Williams*, has since been amended by the legislature. *See* FSSLA 2019, ch. 4, §§ 1, 77.

[29] *See* former AS 12.55.125(i)(3)(A) (2012).

[30] First-degree harassment is a class A misdemeanor. AS 11.61.118(b). Because Riley was convicted of attempt rather than the completed offense, AS 11.31.100(d)(6) lowered the penalty to that for a class B misdemeanor. Under the law in effect at the time of the offense, a class B misdemeanor was subject to a term of imprisonment of not more than 90 days. Former AS 12.55.135(b) (2012).

and that the need for rehabilitation was outweighed by these other sentencing criteria. The trial court then sentenced Riley to a composite term of 10 years and 1 day to serve.[31]

On appeal, Riley argues that his sentence is excessive. Specifically, Riley argues that his sentence is clearly mistaken when evaluated against other similar cases and that the court improperly evaluated the *Chaney* sentencing criteria, giving insufficient weight to rehabilitation.

When we review an excessive sentence claim, we independently examine the record to determine whether the sentence is clearly mistaken.[32] "This standard contemplates that reasonable judges, confronted with identical facts, can and will differ on what constitutes an appropriate sentence and that a reviewing court will only modify a sentence if it falls outside a permissible range of reasonable sentences."[33]

We conclude that Riley's sentence is not clearly mistaken. Although Riley had only one prior felony conviction, he had a lengthy history of misdemeanor convictions spanning the entirety of his adult life. In addition, one year *after* the conduct underlying this offense, Riley committed another sexual crime involving a young girl who was staying in his home.[34] In both cases, the victims testified that Riley smelled of

---

[31] Specifically, the trial court sentenced Riley to a 10-year term of imprisonment for the second-degree sexual assault conviction and a 7-day sentence for the attempted harassment conviction, with 1 day running consecutively to the sexual assault sentence.

[32] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

[33] *Galindo v. State*, 481 P.3d 686, 690 (Alaska App. 2021) (internal citations and quotations omitted).

[34] In the other case, Riley was convicted of second-degree sexual abuse of a minor and two counts of attempted second-degree sexual abuse of a minor, for conduct that took place on March 8, 2013. Riley was sentenced in that case on June 11, 2018, prior to his August 2018 sentencing in this case. Riley appealed his two convictions for attempted second-
(continued...)

alcohol, suggesting that Riley's ongoing substance abuse played a role in the offenses. Having review the record, we conclude that it supports the trial court's finding that Riley was not a good candidate for rehabilitation.

We have noted that "a sentencing judge bears primary responsibility for determining the priority and relationship of the various sentencing goals in each case."[35] Having reviewed the record, we conclude that, under the circumstances of this case, the court was not clearly mistaken in emphasizing community condemnation and isolation as the primary sentencing criteria. We also conclude that, given Riley's poor prospects for rehabilitation, the court could reasonably decide to give little weight to rehabilitation. We accordingly reject Riley's excessive sentence claim.

Conclusion

The judgment of the superior court is AFFIRMED.

---

[34] (...continued)
degree sexual abuse of a minor, and we reversed his conviction on one count and affirmed his conviction on the other. *See Riley v. State*, 515 P.3d 1259, 1269 (Alaska App. 2022).

[35] *Pickard v. State*, 965 P.2d 755, 760 (Alaska App. 1998) (citing *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973)).